

**BOEING RESPONSE TO VERIZON AIRFONE'S
EX PARTE PRESENTATIONS OF
SEPTEMBER 3 AND 10, 2004
FCC WT Docket 03-103**

On September 3 and 10, 2004, Verizon Airfone ("Verizon") submitted *ex parte* presentations in the above-referenced proceeding concerning the authorization of air-to-ground ("ATG") services in the 800 MHz band. Verizon's presentations attempt to demonstrate that Boeing will enjoy an unfair advantage if the FCC permits it to obtain an authorization to offer ATG services. Verizon also argues that the FCC may not realign the 800 MHz ATG spectrum in a manner that affects its current operations in any way. As shown below, these assertions are entirely without foundation.

If there is one entity that is poised to dominate broadband ATG, it is Verizon, by virtue of its dominant position in the U.S. telecommunications marketplace generally and as the sole current provider of ATG. Verizon's proposal for licensing a single broadband ATG service provider is a prescription for a monopoly in the air. Boeing's sharing proposal, by contrast, will allow several licensees to compete for new broadband ATG business on a common footing. Although ATG service providers must partner with individual airlines to provide broadband ATG to airline passengers, competition is far more likely than monopoly to drive improvements in technology and reductions in cost that will benefit passengers who use the service.

Verizon's claims that the FCC may not relocate its operations without conducting hearings under Sections 312 or 316 of the Act are similarly unfounded. Verizon has already had whatever process it is due for the FCC to act. Moreover, the proposed relocation of Verizon's operations is consistent with past precedent. Finally, in this case, the FCC's action would not constitute a taking under the Fifth Amendment. Verizon's arguments are without foundation and should be dismissed.

Verizon, not Boeing, has a Substantial Advantage in the Provision of ATG Services

In its September 3, 2004 *ex parte* presentation Verizon argues that Boeing is “particularly well positioned to compete in the domestic ATG market” because it is already providing aeronautical mobile satellite service (“AMSS”) on certain international routes. It also asserts that Boeing is “uniquely positioned to exploit its role as a manufacturer of aircraft” in pursuing the terrestrial 800 MHz ATG service. Both of these unsupported arguments mask Verizon’s own dominance in the telecommunications marketplace and its ability to use that dominance to monopolize the terrestrial ATG service unless the Commission authorizes sharing of the ATG band.

While it is undeniably true that Boeing is the world’s leading aircraft manufacturer, there is no connection between that fact and some supposed advantage in providing ATG service. When cellular service was initially introduced, most phones were installed in vehicles. It would not have been credible for radio common carriers to argue that General Motors had a leg up in the cellular business, however, or to suggest barring GM from becoming a cellular service provider. Similarly, Boeing’s status as a manufacturer has no relationship to its ability to participate in the terrestrial ATG market.

Nor does Boeing’s current provision of AMSS service on wide-body international flights give it any advantage in its ability to compete in the domestic ATG market. As Boeing has explained in prior submissions in this proceeding, AMSS is generally viewed as complementary to, and not directly competitive with, terrestrially based ATG offering. For example, AMSS is particularly well-suited to the provision of service on long-haul flights over water or other harsh terrain where the construction and operation of terrestrial facilities is impractical or even

impossible. Satellites also may be a more efficient means of delivering point-to-multipoint services like multi-channel video services.

For broadband service within the continental United States, however, the spectrum re-use and cost structures associated with a terrestrial ATG system may make it more appropriate than satellites. The high volume of domestic passenger traffic will require systems that can accommodate substantial demand, and the widespread use of narrow-body aircraft in the domestic fleet will require the lowest possible equipment and service cost. While AMSS is certainly an appropriate vehicle to enter the domestic ATG market (particularly for long-haul flights), any provider without access to spectrum for terrestrial ATG service – even Boeing – may ultimately find itself competitively disadvantaged vis-à-vis a provider that can serve that market with a terrestrial or hybrid satellite-terrestrial ATG network. Verizon's requests notwithstanding, the Commission should not handicap Boeing under the misapprehension that AMSS will be fully substitutable for terrestrial ATG.

Ironically, if there is an entity that is uniquely positioned to enjoy an unfair advantage in the provision of ATG services it is Verizon. Verizon is the incumbent monopoly ATG provider, and a licensing scheme that provides for only a single 2.5 MHz ATG licensee will enable it to perpetuate that monopoly and extend it to broadband service. As the incumbent, Verizon is in a position to outbid any other applicant for that license because it already has an air-to-ground infrastructure in place and an established customer base. Even if there were a second license available for the 1.5 MHz remaining in the band, the holder of that license would be unable to provide broadband ATG service. The value of that smaller block would be further diminished if, as has been proposed, Verizon would be permitted to migrate its existing narrowband operations to that block. Indeed, given the significantly compromised nature of the 1.5 MHz block, Verizon

could well be the only bidder for this spectrum as well, putting it in control of the entire ATG band.

Verizon, of course, is more than just the incumbent ATG provider. As one of the world's largest providers of telecommunications services, Verizon has brand recognition, the customer base, and the financial and other resources to dominate the broadband ATG market. Verizon also has expertise in developing interconnection agreements, system designs, and other features of a telecommunications network that potential competitors will be required to create, giving it a further advantage over other bidders for ATG spectrum. Verizon's firmly established roots in the telecommunications industry provide a true advantage in the ATG market, in stark contrast to their feeble efforts to demonstrate some imagined advantage stemming from Boeing's experience as a maker of aircraft.

If Verizon becomes the monopoly provider of ATG service, it will enjoy a significant competitive advantage over AMSS licensees for the reasons noted above. This competitive advantage will be particularly pronounced in the provision of voice communications services. As Airfone's dismal experience with \$3.00 per minute service has shown, consumers will only use voice communications services at prices similar to those offered by terrestrial carriers. Indeed, Verizon has begun to make available ATG services at ten cents per minute to customers of its affiliate, Verizon Wireless. Verizon's current marketing plan highlights the danger of permitting Verizon to monopolize the ATG market and using that monopoly to gain an unfair advantage over competitors in the terrestrial wireless market.^{1/}

In contrast to Verizon's proposal for a monopoly broadband ATG licensee, Boeing has proposed sharing rules that would permit the operation of up to four competing systems in the

^{1/} "Verizon Wireless and Verizon Airfone Offer 10 Cents-A-Minute In-Flight Calls and Discounted JetConnect Services," Press Release (March 1, 2004), *available at* Verizon News Center, <http://news.vzw.com>.

ATG band, just as Boeing faces competition from other AMSS providers such as ARINC, Inmarsat and others, including Air TV and Hughes Network Systems.^{2/} The rules to permit this shared use of the band are straightforward, technology-neutral and cost effective, and would create a competitive marketplace that would benefit passengers and airlines alike. While ATG providers must partner with airlines to install equipment and offer service, those airlines, competing for passengers, will be anxious to offer the best ATG services at the most competitive prices. With a single broadband ATG provider, price and the pace of innovation will be up to the monopoly provider. Multiple providers, by contrast, will compete to provide the best services to airlines at the most competitive prices. The resulting innovation and price competition will directly benefit passengers who use the service.

The FCC has the Flexibility to Address Verizon's Incumbent Position without Perpetuating its Monopoly

If the Commission determines that fundamental reform of its spectrum rules is required to ensure that a particular spectrum band is used efficiently – as it will propose here – it has considerable flexibility in how it deals with incumbents.^{3/} Contrary to Airfone's contention, the Commission is not required to conduct revocation or modification hearings or provide for the funding of Airfone's relocation as a prerequisite to taking the steps necessary to increase competition and improve service to the public in the ATG market.

First, there is no basis for Airfone's assertion of special procedural protections under sections 312 (license revocation) and 316 (license modification) of the Communications Act.

^{2/} See <http://www.airtv.net> (AirTV's "dedicated satellite network will provide 60 channels of live television, plus 40 Mbps of Internet and data connectivity to airlines . . ."); "Row 44 To Offer Satellite-based Virtual Private Network Connectivity Solution to the Aviation Industry," <http://www.airfax.com/airfax/releases/showrelease.asp?id=1203> ("Row 44, through an agreement with Hughes Network Systems (HNS), announced that it will offer DIRECWAY® broadband satellite connectivity to commercial and business aircraft").

^{3/} See *NPRM* ¶¶ 17-18.

The Commission has authority to modify Airfone's license if, in its judgment, such action is necessary to increase the viability of air-to-ground operations on dedicated spectrum. As the D.C. Circuit Court of Appeals recently held, "Section 316 grants the Commission broad power to modify licenses; the Commission need only find the proposed modification serves the public interest, convenience and necessity."^{4/} Airfone need not consent to the modification and the Commission need not give Airfone's arguments consideration outside of the general public interest analysis.^{5/}

In any event, there are no grounds for Airfone's supposition that the Commission will "summarily revoke or modify" its license. As Airfone acknowledges, the Commission has set out in writing various options for improving efficiency in the ATG band, some of which may require modifications of Airfone's license. Airfone has taken the opportunity to respond on several occasions to the Commission's proposals, and will have more opportunities in the future to argue against modification and for renewal of its license.^{6/} The Communications Act requires nothing more.

Second, Airfone misconstrues the relocation "rights" of incumbent licensees. If the Commission decides to open the ATG band to additional licensees, its "relocation policies do not dictate that [incumbent] systems be relocated to spectrum-based facilities or even to the same

^{4/} *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) ("CMMC").

^{5/} See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, FCC 04-168, ¶ 65, nn. 215-216 (rel. Aug. 6, 2004) (citing *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 288 (D.C. Cir. 1953) (FCC may modify a license without an application by the licensee); and *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) (licenses may be modified on a service-wide basis, without license-by-license consideration)).

^{6/} Airfone's argument that it is entitled to a "renewal expectancy" is beside the point. Regardless of any such expectancy, the Commission is not required to renew Airfone's license unless it finds doing so would promote the public interest. In the *NPRM*, the Commission determined that retaining the status quo in the ATG band does not serve consumers and thus it may take any actions necessary to correct the market failure.

amount of spectrum as they currently use, only that comparable facilities be provided.”^{7/} As the Commission emphasized in similar circumstances, “[g]iven advances in technology,” incumbents can “be accommodated using substantially less spectrum than that of . . . [their existing] allocation.”^{8/} Airfone is the only provider remaining of the six initially licensed in the ATG band, but its occupation by default of all four megahertz of the ATG band is not carved in stone. Because a “continuation of Verizon Airfone’s existing services”^{9/} is achievable on less than the entire ATG band, the Commission may lawfully direct Airfone to confine its operations to one or more portions of the band.^{10/} Further, although the Commission generally requires new entrants to cover incumbents’ relocation costs, Airfone’s costs should be minimal because its operations would remain in the same band. The Commission has made clear that it is not the responsibility of incoming licensees to provide anything more than the incumbent actually needs at the time of relocation.^{11/}

Finally, an FCC decision to alter the ATG band licensing rules in this case does not amount to an uncompensated taking of Airfone’s property in violation of the Fifth Amendment.

^{7/} *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, The Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band, Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service, Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service, Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service*, ET Docket No. 00-258, IB Docket No. 99-81, RM-9911, RM-9498, RM-10024, *Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order*, 18 FCC Rcd. 2223 ¶ 72 (2003).

^{8/} *Id.*

^{9/} *See Airfone Sept. 9, 2004 Ex Parte* at 6.

^{10/} For example, when the Commission ordered the relocation of the Broadcast Auxiliary Service (“BAS”) licensees to accommodate new entrants, it reduced the BAS spectrum allocation by 35 megahertz. The Commission found that changes in technology would allow BAS licensees to operate on narrower channels. *Amendment of the Commission’s Rules To Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315 ¶¶ 11-13 (2000).

^{11/} *Id.* ¶ 92 (declining to change the definition of “comparable facilities” to require new entrants to “subsidize the future business growth of . . . incumbents”).

The Communications Act “provide[s] for the use of [radio] channels, *but not the ownership thereof*.”^{12/} This is especially the case considering that Airfone did not purchase its license at auction and originally was licensed only for a small fraction of the band it now occupies.

Similarly, there is no basis for Airfone’s contention that a change in ATG licensing would constitute a “regulatory taking.” Under the test articulated by the United States Supreme Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), a court will examine whether the governmental action is in the public interest, its economic impact on the regulatee, and its interference with reasonable investment-backed expectations. Here, not only would the Commission’s alternative proposals promote the substantial governmental interest of increasing choice and competition for ATG consumers, there is no question that Airfone would not be deprived of the economically viable use of its property. The Supreme Court has made clear that an uncompensated taking occurs only if the regulation “jeopardize[s] the [regulated entity’s] financial integrity”^{13/} or requires the company to “operate its entire business at a loss.”^{14/} Notwithstanding Airfone’s dire admonitions, the Commission is not required to maintain its current ATG licensing scheme or even to renew Airfone’s license to avoid running afoul of the Fifth Amendment.

^{12/} 47 U.S.C. § 301 (emphasis added). *See also FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (“[N]o person is to have anything in the nature of a property right as a result of the granting of a license.”).

^{13/} *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989); *see also Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

^{14/} *Baltimore & Ohio R.R. v. United States*, 345 U.S. 146, 148-150 (1953).